No. 7937

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RICHARD C. HYLAND, doing business under the fictitious name and style of Hyland Bag Company,

Appellant,

vs.

MILLERS NATIONAL INSURANCE COMPANY (a corporation), DUBUQUE FIRE & MARINE INSURANCE COMPANY (a corporation), NATIONAL RESERVE INSURANCE COMPANY (a corporation), MINNESOTA FIRE INSURANCE COMPANY (a corporation), FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY (a corporation), THE MERCHANTS FIRE INSURANCE COMPANY (a corporation), WESTERN INSURANCE COMPANY OF AMERICA (a corporation), and NATIONAL LIBERTY INSURANCE COMPANY (a corporation),

Appellees.

APPELLANT'S PETITION FOR A REHEARING.

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Appellees.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellant hereby petitions this Honorable Court for a rehearing of the above entitled cause.

PRELIMINARY STATEMENT.

In this case, this Honorable Court is a Court of Equity. The majority opinion holds appellant cannot recover upon the insurance contracts sued upon by him because of the failure of appraisal and because in the view of the Court his claim for out of sight loss was too large. The majority opinion therefore as a Court of Equity decrees a forfeiture upon appellant of many thousands of dollars which we believe to be justly due him upon said insurance contracts, and stigmatizes appellant as having knowingly and intentionally attempted to commit a fraud.

We sincerely believe that the majority of this Honorable Court has not given adequate consideration to the difficult situation which presented itself to appellant at the time of the fire here involved; that appellant has been held to a standard of perfection and knowledge of detail in the management of his business which few, if any, men could meet in operating a large business.

That appellant was not in personal charge of his factory has never been questioned. His factory was working overtime. His accountant stated that his bookkeeping was very much behind: "with reference to the period between June 1, 1929 and October 19, 1929, the entries made in the books were not kept up to date." (V. III, p. 1301.) The accountant also testified that the material on hand was always more than his records showed "running into large figures" (V. III, p. 1365.) The testimony of two witnesses called by defendants shows definitely that no one knew

exactly what was on hand immediately following the fire. Thus witness Terkelson, for defendants, testified:

> "I kept asking, I asked Mr. Taylor on three or four occasions, I asked Mr. Hyland, and I asked Mr. Sugarman on several occasions, also if they had any idea what the valuations were, so that I could assist in the apportionment of the claim. Everyone I asked told me they didn't know. I have a hazy recollection that I was informed on Monday, Oct. 21, 1929, that the valuations might run around $130,000, but it did not come from any official source." (V. VI, p. 2970.)

Witness Smith for defendants, testified that on the day after the fire:

> "I went back to the office and I saw Mr. Taylor again, and at that time he told me—he had told me that he was the accountant for the Hyland Bag Company, or bookkeeper. I don't know just how he expressed it, but he wanted to know what work that would make for him, what his duties would be as bookkeeper, and I told him that it would be proper for him to close his books as of the date of the fire. *And I asked him if he knew what quantity of merchandise there was in there, what the value of the merchandise was, and he told me he didn't know exactly, but he thought it was less than $100,000, and between $90,000 and $100,000 I would say. I think those were his words as I recall them.*" (Italics ours.) (V. V, p. 2622.)

This same witness testified that he "did not have much confidence in any perpetual inventories." (V. V, p. 2622.) Plaintiff saw what he judged a lot of ashes after the fire (V. I, p. 471) and it appears beyond dis-

pute that a great deal of debris was removed from the building following the fire. (V. VI, pp. 3050-3060; V. II, pp. 767-8.)

Appellant at the suggestion of his adjuster took the only reasonable course, and called in expert accountants whose reputation and integrity have never been questioned and asked them to determine as accurately as possible what was in his factory at the time of the fire, and based upon their report he filed his proof of loss. No better mode of procedure can be suggested, the good faith of this procedure was not questioned and defendants' accountant testified that appellant's accountant had "fairly done their work" (V. V, p. 2391), and subsequent to presenting the proofs of loss and prior to the filing of defendants' answers in this case, there was no claim or suggestion of false swearing.

To fasten a charge of false swearing upon appellant under these circumstances, is contrary to the evidence and without sanction or parallel in the annals of the law.

Likewise upon the question of appraisement it is respectfully submitted that the majority opinion must have been predicated upon insufficient consideration of the underlying merits of the controversy favoring appellant, due doubtless to the voluminous record and the burden this Court has carried in maintaining a current docket.

Appraisal failed because no umpire was agreed upon.

No witness, not even Colbert, whose testimony is termed "a confession", testified or suggested that ap-

pellant interfered with the attempt to choose an umpire, or tried to dictate the choice of an umpire, but on the other hand Colbert testified that he "would take no dictation from anybody, but the thing would be settled absolutely on business merits with Mr. Maris and the third party, whoever it might be." (V. III, p. 1291.)

Moreover, that Colbert, as appellant's appraiser, made a genuine effort to consummate the appraisal appears from the correspondence in the record between the two appraisers. (V. V, pp. 1265-1285.) The effort to reach an appraisal continued for a considerable time after suit might have been brought, and Colbert especially urged an appraisal rather than a sale of the merchandise. (V. III, p. 1275.) He invited Maris to suggest the name of any of the Judges of the Superior Court. (V. III, p. 1278.) But Maris didn't want a Judge of the Superior Court. (V. III, p. 1279.) One umpire (E. W. Wilson), agreeable to both parties, declined to act for personal reasons. Another suggested umpire (Mr. Logie), suggested by Colbert and belatedly accepted by Maris, would not act except upon certain stipulations. Although it is not definite in the record, apparently he had prejudged one of the disputed matters, and, if so, Colbert properly suggested the refusal to act which followed a conference with him.

Conrad v. Massasoit Ins. Co., 4 Allen (Mass.) 20, 22;
5 *C. J.* 65-6.

There is evidence in the record without any contradiction that Maris the appraiser appointed by defend-

ant, was not disinterested. (V. III, pp. 1284-5.) *If he was not disinterested, then, even if it is assumed that Colbert was not disinterested, the law places the burden of the failure upon defendants, and appellant was entitled to bring his action.* (See First Ground for Rehearing, Subdiv. 4, p. 17, infra.)

Finally, appraisal not having been made, the salvaged property was sold at auction with the consent of defendants, and dispersed among many buyers. The appraiser for defendants left the city for some weeks. (V. III, p. 1279.)

Under these circumstances this case would seem a travesty upon the name of equity for this Honorable Court to hold plaintiff cannot maintain his action by reason of failure of arbitration.

Specifically a rehearing is asked upon the grounds hereinafter stated.

FIRST GROUND FOR REHEARING.

THE COURT ERRED IN FAILING TO CONSIDER THE POINT THAT APPRAISAL WAS WAIVED BY APPELLEE COMPANIES.

While the majority opinion refers constantly to "arbitration", it should be pointed out that the policies do not provide for a general arbitration, but the clause in the policies in question is "an agreement for an appraisement and not an arbitration."

Phoenix Fire Assur. Co. v. Murray, 187 Fed. 809, 810 (CCA 3rd).

Appellant made the point both in his brief (Brief for Appellant, pp. 67, 76-78) that appraisal was waived; and in his reply brief (Appellant's Reply Brief, p. 25) that appellees waived any objection to appellant's appraiser on the ground that he was not competent or disinterested.

Though the evidence in this case fully supports both the waiver of the appraisal by the appellees, and the waiver of any objection to the appellant's appraiser on the ground that he was not competent or disinterested, the Court has entirely failed to give any consideration to these facts.

1. Appraisal was waived by appellees' consent to sale of damaged merchandise.

The damaged stock remaining after the fire was sold at public auction on April 22, 1930. Such sale, of course, made appraisal impossible. Yet, this sale was made with the consent and in conformity with the wishes of R. V. Smith, adjuster for appellees (Tr. V. I, pp. 385-6), and in fact said adjuster was a bidder, though not a purchaser at the sale. (V. I, pp. 998, 1001.) This consent to the sale of the damaged stock, being entirely inconsistent with reliance upon a claim of forfeiture for non-appraisal, most certainly waived the provision of the policy for forfeiture based upon failure of appraisal.

> "A provision for arbitration or appraisal, of course, may be waived. And either party waives the right to insist upon such provision by any action inconsistent with reliance thereon."
>
> 26 *C. J.* 429.

"That the portion of the policy contract which makes arbitration of damage a condition precedent may be waived by the company is now the uniform holding of the courts. And the courts in determining the question of waiver, hold the company to a strict compliance with the specific terms of the contract before they will so apply the condition as to work a failure to the insured of his right to sue * * * There must be, on the part of the insurer, no action which is inconsistent with the right to rigidly insist on an award as a condition precedent, else the right is waived * * *."

Harrison v. German American Fire Ins. Co., 67 Fed. 577, 582.

"The provisions of the policy requiring an appraisal in case of disagreement and the furnishing of proofs of loss, were for the benefit of the company and could be waived by it."

Western Underwriters Assn. v. Hawkins, 77 N. E. 447, 449 (Ill.).

"A provision in a policy of fire insurance providing for an appraisal, in case of disagreement as to the amount of loss, as a condition precedent to a right of action, is an enforceable and valid provision * * * but there is no doubt that provisions of this character are as susceptible of waiver as are provisions in any other sort of contract, and, if waived, they are no longer a bar to the bringing of an action upon the contract. * * *

A right of this character once waived can never be revived without the consent of the other party."

Johnstone v. Home Ins. Co., 34 S. W. (2d) 1029, 1032-3.

As a matter of law and fact, could there be any stronger evidence that the companies did make a waiver of appraisal of the loss and damage, than is shown by their consent to the sale of the damaged goods, and its dispersion among many purchasers? Since the stock was not only immediately dispersed, but it would quickly be used in a multitude of ways, it seems incontrovertible that this consent was a waiver of appraisal, and consequently a waiver of forfeiture for non-compliance with the appraisal provision in the policy

> "Where the insurer, with knowledge of a right to forfeit, sells the salvage from the fire, it thereby waives its defense."
>
> 26 *C. J.* 338.

There is no difference in principle apparent between a sale by the insurer and the insurer's consent to such a sale by the insured.

The majority opinion is erroneous in holding that there was a forfeiture by reason of non-appraisal, when such appraisal was waived.

2. Objection to competency or disinterestedness of appraiser appointed by appellant, was waived by failure to seasonably object to appraiser on this ground.

The law applicable to waiver of objection to an appraiser is stated as follows in 6 *C. J. S.* p. 187:

> "Notwithstanding the existence of facts which may influence the judgment of an arbitrator, if a party with knowledge of such facts, submits his case to the decision of such person, the objection is waived; and the same rule obtains where a

> party, who has agreed to submit to arbitration without knowledge of disqualifying facts, afterward during the progress of the hearing, obtains knowledge thereof, but nevertheless proceeds, without objection to the making of an award."

Sturges in his authoritative work entitled *"Commercial Arbitrations and Awards"*, at pp. 365-6, states the following:

> "In considering the requisite qualifications of persons to serve as members of an arbitration board, it may be well first to call attention to rules of waiver which are applicable to those cases. Most, if not all, causes to disqualify a member are held to be waived in either of the following situations: (1) Where the complaining party has promoted or acquiesced in the appointment of the member complained of with knowledge of the alleged cause of his disqualification; (2) Where the complaining party has not promptly objected to such member continuing in office after he has suspected or become informed of the alleged cause for disqualification. The pleadings and proof of the party setting up the alleged disqualification must exclude both of these possibilities."

The majority opinion lays great stress upon the disqualification of appellant's appraiser, because appellant had at various times prior to the fire paid said appraiser commissions, or given gratuities to him on transactions between appellant and the regular employer of said appraiser. Although we believe that such occasional commissions or gratuities should not be held to disqualify appellant's appraiser, yet even if it did, such disqualification must be held to have been

waived, for the record does not show that any objection was ever raised by defendants to said appraiser on this, or any other ground prior to the filing of defendants' answers. The fact of the gratuities to appellant's appraiser on occasions previous to the fire was entered in appellant's books, and the accountants for defendants were given full access to these books immediately following the fire, but said appraiser was not appointed until more than three months after the fire. (V. I, p. 411.) The appellants showed at the trial that they were fully cognizant of the payments to Colbert by demanding the particular ledger sheet where they were entered. (V. III, p. 1706.)

It is, therefore, evident that defendants must have known of such alleged disqualification at the time of the appointment, or during the efforts of the appraisers to reach agreement on an umpire, and they held back their objection for subsequent use when it would be too late for appellant to meet their objection by appointing another appraiser, well-knowing from their wide experience in their specialized insurance work, that if the appraisal failed because of any burden that could be thrown upon appellant, they might avoid payment of the loss.

In the case of *Ledlie v. Gamble,* 35 Mo. App. 355, 358, where there was an effort to set aside an award on the ground of fraudulent combination between the plaintiff and the arbitrator, the Court stated:

> "Such a case is analogous to that where a party knows of a ground for disqualification of a juror. * * * In the case of a juror in order to make such objection available after verdict, it must appear,

not only that the disqualifying fact was unknown to the objecting party before the trial, but also that it would not have been disclosed to him on proper inquiry."

"That company was under the duty to allege and prove a lack of knowledge of the things complained of, in order to escape the burden of having waived such things."

Pope Construction Co. v. State Highway Comm., 92 S. W. (2d) 974, 981.

"From these and other authorities it would seem clear that when one seeks to impeach an award he must show that he made objection as soon as he discovered the disqualifying facts."

Pearson v. Barringer, 13 S. E. 942, 943 (N. C.).

The pleadings of defendants do not in any wise suggest or allege that the defendants did not know of the claimed lack of disinterestedness of appellant's appraiser at the time of his appointment, or within ample time to object and demand the appointment of another appraiser. Hence, we believe that if there is any basis for holding that appellant's appraiser was not disinterested, defendants under their pleadings, as well as under the facts, should be held to have waived such disqualification.

The majority opinion states:

"The insurance companies would have no reason to suspect that one in such a position would be a person capable of the frauds committed with Hyland. They were not exposed until Colbert's confession of them in the trial below."

It is respectfully submitted that if by this statement it is intended to mean that the payment of commissions or gratuities received by Colbert from Hyland were not known prior to the trial, there is no foundation in the record therefor. In view of defendants' minute knowledge of appellant's books acquired immediately after the fire, the only statement made by Colbert at the trial which could possibly be claimed not to have been known to defendants at the time of the appointment of Colbert as appraiser, was his claim that certain cancelled contracts were fictitious.

In crediting the claim of fictitious contracts, the indefinite statement of Colbert made at the behest of his employer, an enemy of Hyland (V. VI, p. 3041), under threat of criminal prosecution (V. IV, p. 2126), is accepted against the overwhelming weight of other testimony, that the contracts referred to were genuine. (We ask the Court to refer to Appellant's Reply Brief, pp. 10-19.) The statement of Mr. Newhall that the records of Newhall showed that contracts bearing these numbers were with other persons than appellant, is of slight weight, since Newhall & Co. refused to permit an accountant to make a general examination of their records in reference to this matter (V. VI, p. 3310), and also in view of the fact of the Newhall enmity to Hyland above referred to, and further in view of the fact that Newhall & Co. were in the insurance business. (V. IV, p. 2126.) We believe, therefore, that the evidence shows beyond a question of doubt that there were no fictitious contracts, and moreover, as has been pointed out, even if such existed, they were wholly collateral to any issue in this case.

In view of the statement in the majority opinion above quoted, we further suggest that defendants are in this dilemma: They either knew of this claim of connection between Colbert and appellant at some prior time, and therefore waived any objection by failing to assert it, or they didn't know of Colbert's alleged lack of disinterestedness, and hence could not have intended it when preparing their answer.

For the reasons set forth herein, it should be held that any objection to appellant's appraiser was waived by failure to assert it when the facts became known, or are presumed to have become known to defendants. And if any fact was not learned until the time of the trial, then it could not be inferred that such fact was intended to be comprehended in a pleading drawn long prior thereto.

3. Any objection to appellant's appraiser on the ground that he was not disinterested was waived by failure to plead this defense.

With all due respect to the opinion of the majority filed herein, we submit that under all authorities on pleading that the answer of defendants in reference to the failure of appraisement is not sufficient to raise the question of the competency or disinterestedness of the appraiser appointed by appellant. (V. I, pp. 48-50.) Appellant objected to this answer by motion prior to trial. (V. I, pp. 149-150.)

It will be noted from the answer referred to, that defendants alleged that appellant appointed an appraiser. The language of defendants' answer was as follows:

"And the plaintiff within five days after receipt of such demand and name notified these defendants in writing of the appointment of an appraiser named by him. The appraisers so named did not agree upon the amount of loss or the sound value of the damage, and did not agree upon an umpire. The appraisement was not had due to the acts of the plaintiff and the appraiser appointed by him, and this action was commenced before compliance by the plaintiff with the provisions of each of said policies of insurance regarding the appraisement of the loss." (V. I, p. 50.)

There is not a word in this pleading negativing the competency or disinterestedness of appellant's appraiser, nor is there a specification of any facts whatsoever. The pleading is indeed more general and indefinite than the authorities hold are insufficient because not sufficiently specific.

We quote some of the authorities which state the rules applicable:

"It is not enough to allege generally that the arbitrator was guilty of fraud, partiality, or misconduct; that he failed to pursue his authority, or was the result of a mistake."

5 *C. J.* 203;

Pope Const. Co. v. State Highway Com., 92 S. W. (2d) 974, 977.

"A party seeking equitable relief against an award has the burden of specifically pleading in his bill or complaint sufficient matters or grounds to impeach the award or justify the granting of relief, and no other matters or grounds will be considered. Mere general allegations of fraud,

partiality or corruption, or mistake, or accident are not sufficient; but the particular facts relied on must be stated."

6 *C. J. S.* 258.

"A party objecting to an award or moving to vacate or set the same aside must affirmatively allege or state sufficient and proper available grounds or reasons to justify the interposition of the court; and all grounds or reasons intended to be relied upon should be presented, as none other than those alleged or stated will be considered. In setting forth his grounds or objections the party must specifically state the facts on which they are based, for mere general allegations are insufficient. Particularly is it insufficient to allege generally that the arbitrator was guilty of fraud, partiality or misconduct."

6 *C. J. S.* 261.

"It is plain that general allegations of fraud, and likewise of bias and prejudice without stating definite acts which constitute a fraud or bias or prejudice, are not enough to require judicial inquiry."

Second Soc. of Universalists v. Royal Ins. Co., 109 N. E. 384, 387.

Although the foregoing authorities are in instances attempting to set aside an award, no distinction in principle can be shown from a situation where it is claimed no award has been made because of some fault of the appraiser.

Therefore, considering these authorities, and established principles of pleading, the answer raised no is-

sue upon the disinterestedness of appellant's appraiser, and it is most serious error to make any decision against appellant based on this ground.

4. Appraisal was waived by the appointment by defendants of an appraiser known by them not to be disinterested.

Reference to the terms of the policy provision for appraisal shows that before there was any obligation upon appellant to act, defendants were required to appoint a "competent and disinterested appraiser."

If defendants failed to appoint a disinterested appraiser, they could not defend upon the ground of appellant's failure in this regard. The law has been stated as follows:

> "When the insurer demands the appraisal, it must in good faith nominate a competent, disinterested person as appraiser, before it can defend upon the ground that the insured has failed to keep that part of his contract. Chapman v. Rockford Ins. Co., 89 Wis. 572, 62 N. W. 422; Broch v. Dwelling House Ins. Co., 102 Mich. 583, 61 N. W. 67. Having once waived the appraisal by its conduct, the insurer cannot require that the matter in dispute be again submitted to arbitration."
>
> *Continental Ins. Co. v. Vallindingham,* 76 S. W. 22, 24 (Ky.).

> "Where fire policy required appointment, in case of disagreement, of two disinterested appraisers who should choose a third, such clause being for the benefit of the insurer, it waived such benefit by appointing an appraiser, who was not disinterested, but was in its employment, and it

was no defense that the insured also appointed an interested appraiser." (Headnote.)

Delaware Underwriters v. Brock, 206 S. W. 377 (Tex.).

By the only evidence bearing on his qualifications in this case (V. III, pp. 1284-5) it appears that defendants' appraiser was a professional adjuster working entirely for insurance companies, and was therefore not a disinterested appraiser within the terms of the policy. This evidence was in a letter from Colbert to Maris, in which the following was stated:

> "I have only recently learned that you are an insurance adjuster, *entirely in the employ of the insurance companies and have been so for many years*—in view of this fact any fair-minded person would decide that the failure to appraise could not be and in fact was not, attributable to the writer." (V. III, pp. 1284-5.) (Italics ours.)

This statement of the employment of defendants' appraiser has never been denied, or in any wise contradicted, though the letter was placed in evidence early in the trial and defendants had ample opportunity to call Maris or produce other contrary evidence if it was not true.

The law in this regard seems well settled by a number of authorities.

Under a provision for appraisement identical with that in the policies here involved, it was held in the case of *Coon v. National Fire Ins. Co.,* 213 N. Y. S. 407, that a professional appraiser for insurance com-

panies designated by the company to act as appraiser was not disinterested, and an award was set aside.

In the case of *Hartford Fire Ins. Co. v. Asher,* 100 S. W. 233, 234, the Court of Appeals of Kentucky stated:

> "It has been well said that an habitual appraiser is not a disinterested person, within the meaning of the arbitration clause in insurance policies."

Other authorities indicating similar views are:

Bradshaw v. Agr. Ins. Co., 32 N. E. 1055 (N. Y.);

National Fire Ins. Co. v. Bennett, 137 S. E. 570 (Ga.);

Marshall v. American Alliance Ins. Co., 274 P. 243, 244 (Kan.);

Delaware Underwriters v. Brock, 206 S. W. 377 (Tex.).

It is an inevitable conclusion from the evidence pertaining to Maris, defendants' appraiser, which has never been contradicted, that said appraiser was not disinterested, and by appointing such appraiser defendants waived the clause for its benefit which required the appraisal. Compliance with this provision was required of appellant only after defendants had appointed a disinterested appraiser. This it appears defendants never did.

> "* * * The courts in determining this question of waiver, hold the company to a strict compliance with the specific terms of the contract be-

fore they will so apply the condition as to work a failure to the insured of his right to sue."

Harrison v. German American Fire Ins. Co., 67 Fed. 577, 582.

Finally, upon this point, it should be pointed out that neither the trial Court, nor the majority opinion of this Honorable Court finds that defendants appointed a competent or disinterested appraiser as they were required to do before any obligation in this regard fell upon appellant. The Colbert letter to Maris was written prior to defendants' answer and therefore defendants had knowledge of the claim that their appraiser was not disinterested. The issue as to whether defendants' appraiser was disinterested was made upon defendants' affirmative defense. Defendants were required to allege and prove "a strict compliance with the specific terms of the contract." They realized this and alleged the appointment of a competent and disinterested appraiser. (V. I, p. 50.) This was put in issue by appellant's implied replication. (Equity Rule 31, U.S.C.A. Sec. 723; *Arkansas v. Mississippi,* 250 U.S. 39, 63 L. ed. 832.) There was no finding or proof that defendants had complied, but the only evidence was that they did not comply, but in fact appointed a disqualified appraiser. Under these circumstances the Court should have held that this defense (if properly pleaded) was not sustained and appraisal was waived.

SECOND GROUND FOR REHEARING.

THE COURT ERRED IN HOLDING THAT IN THE ABSENCE OF A FAIR EFFORT ON THE PART OF THE INSURED TO OBTAIN ARBITRATION THE INSURED COULD NOT RECOVER.

The Court in its opinion cites only one California case on the question of arbitration or appraisement, namely, *Old Saucelito L. & D. Co. v. C. U. A. Co.*, 66 Cal. 253, which held that adjustment was a condition precedent to action "and that until such adjustment, or a fair effort on the part of the insured, no cause of action arose." (66 Cal. 253, 258.) Since that case was decided the standard statutory form of fire insurance policy has been adopted, and the Supreme Court of California pursuant to said statute has changed its views that arbitration or appraisement was an absolute condition precedent to action. It is now held by the Supreme Court of California that for appraisal to become a condition precedent to action by the insured, the insurer must show full compliance with the requirements to bring the appraisal into being.

In the case of *Winchester v. North British etc. Co.*, 160 Cal. 1, the Supreme Court of California considered a number of its previous cases concerning the question of appraisal as a condition precedent and held that appraisal was not a condition precedent and was waived by the failure of the insurer to demand appraisal. The appellant in that case cited *Old Saucelito L. & D. Co.*, supra, and other cases claiming that arbitration was "a condition precedent to the right to sue where the insurer and the insured have failed to agree." But the Court refused to sustain this contention and said:

"But even if it is conceded that the opinions in the cases just discussed tend to sustain appellant's position, then we must hold that those cases are to that extent overruled by the later opinion of this court in Bank in Case v. Manufacturers Fire and Marine Ins. Co., 82 Cal. 266." (160 Cal. 7.)

In the case at bar the policies provided:

"If the insured and this company fail to agree, in whole or in part, as to the amount of loss within ten days after such notification, *this company shall forthwith demand in writing an appraisement of the loss or part of loss as to which there is a disagreement and shall name a competent and disinterested appraiser, and the insured within five days after receipt of such demand and name shall appoint a competent and disinterested appraiser.*" (V. I, p. 311.)

We ask this Court to note particularly that before there is any obligation on the insured to act in reference to an appraisement, the insurer must appoint a competent and disinterested appraiser, and if the insurer does not appoint a competent and disinterested appraiser, there is never any obligation on the insured to act in reference to an appraisement.

Hence, the law does not now require the insured to take the initiative as was the case in *Old Saucelito L. & D. Co.,* 66 Cal. 253, but the company for whose benefit the provisions exist can bring the appraisement into being only by a strict compliance with all the necessary requirements on its part, and if the company fails in such strict compliance in any particular, the appraisal

is not required as a condition precedent to action by the insured.

It is the general law that appraisal is not a condition precedent, but is waived where the insurer appoints a partisan appraiser. Thus the rule, supported by many authorities, is stated in a note in 94 *A. L. R.* p. 510, as follows:

> "The insurer also waives appraisal where it seeks an improper advantage by selecting as its appraiser a partisan who is willing and anxiously persistent in serving its interests."

It seems manifest that under the terms of the policies here involved, under the law of California, and under the general law, appraisal was a condition precedent to suit on the policies here in question only after strict compliance by defendants with the terms of the policies.

It has never been proved and never been found by the trial Court or this Honorable Court that defendants appointed a competent and disinterested appraiser. On the contrary it appears in the evidence that he was not disinterested. Therefore, this Court has committed clear and prejudicial error in holding that appraisal or a fair effort on the part of appellant was a condition precedent to litigation by appellant.

THIRD GROUND FOR REHEARING.

THE COURT ERRS IN HOLDING THAT APPELLANT MADE "NO FAIR EFFORT" AT ARBITRATION, BUT FRAUDULENTLY FRUSTRATED ARBITRATION.

That there were gratuities to Colbert from Hyland is true, that Hyland loaned Colbert money is true. It is not true, however, that there were any fictitious contracts, and this claim is against the great weight of the evidence. Colbert's testimony, characterized by the majority opinion as a "confession" was most uncertain and indefinite; it was given to please his employers after he had been kept a prisoner over night and after a threat of criminal prosecution (which threat had nothing to do with his dealings with Hyland). His testimony, under these circumstances, should not be credited against the overwhelming weight of other testimony to the contrary.

There is not any evidence that appellant in any wise attempted to influence his appraiser during the course of attempting to reach an appraisal, there is not any evidence that appellant suggested the name of any prospective umpire, or insisted upon any particular umpire. As stated, the only act of appellant in connection with the appraisal was to appoint Colbert as his appraiser. If there was any fault on his part, it was that Colbert was not "disinterested" within the meaning of the appraisal provision in the policy. However, as is cogently pointed out by the dissenting opinion, this defense was not pleaded, though to be relied upon it must be specifically pleaded.

Hence, the statement of the Honorable Court that appellant made no fair effort to reach an appraisal is,

we respectfully submit, not warranted by the facts in the record.

We submit, moreover, that the evidence shows that Colbert made a fair effort to agree upon an umpire. He suggested the names of a large number of prominent business men and citizens of the community. He was willing to accept one suggested by defendants' appraiser (Mr. E. W. Wilson) but this gentleman declined to act. He invited the defendants' appraiser to suggest the name of any Judge to the Superior Court (V. III, p. 1278), but the defendants' appraiser didn't want any of the Judges. (V. III, p. 1279.) After naming Mr. Logie without first consulting him, Colbert found that Mr. Logie would accept only on certain conditions, one of which amounted to prejudging the case, and rightfully suggested that Mr. Logie decline to act. Although the majority opinion regards this as reprehensible, its view is entirely erroneous for it was entirely proper to eliminate any proposed umpire who had in any wise prejudged the case.

Conrad v. Massasoit Ins. Co. v. Allen (Mass.), 20, 22;
5 *C. J.* 65-6.

The first disqualifying question of any juryman is "Have you formed any opinion on this case?"

The entire record of the dealings between the two appraisers shows that Colbert made strenuous efforts to get an umpire appointed and the failure to reach an agreement can more readily be attributable to defendants' appraiser than to Colbert. (V. III, pp. 1265-1286.) Why should not defendants' appraiser be will-

ing to take some one of the sixteen judges of the Superior Court in San Francisco?

Attributing to appellant the acts of his appraiser, it appears that the majority opinion is entirely in error in concluding that appellant made no "fair effort" to reach an appraisal. On the other hand the defendants' appraiser, by his absence for several weeks, by his refusal to accept any of the many competent and disinterested men suggested to him as umpire (except one who had prejudged the matter), may be said to be responsible for the failure of appraisal.

FOURTH GROUND FOR REHEARING.

THE COURT ERRED IN HOLDING THAT PLAINTIFF WAS GUILTY OF FRAUD OR FALSE SWEARING WHEN HE SWORE TO HIS PROOFS OF LOSS.

The Honorable Court in its majority opinion argues and finds that the claim of out-of-sight loss of over $15,000.00 in the proof of loss was materially overstated, and then, after correctly holding that overvaluation itself does not avoid a claim for fraud or false swearing, proceeds to hold that fraud may be inferred from the overvaluation and certain other stated matters.

This holding of the Court is in error for several reasons:

A. In so holding the Honorable Court has overlooked and failed to follow the well established rule, both in law and equity, that fraud is never presumed, but must be affirmatively proved.

The rule supported by a multitude of cases is stated in 12 *Cal. Juris.*, p. 816, as follows:

> "Fraud is odious and is never presumed; it must be established by proof. The presumption always is in favor of fair dealing, except, perhaps where confidential relations are involved. This presumption has been said to approximate in strength that of innocence of crime. The burden of proving fraud, therefore, rests upon the person asserting it."

> "The evidence of these matters, facts, and circumstances taken together must amount to proof of fraud, and not to a mere suspicion thereof, for the presumption of the law, except where confidential relations are involved, is always in favor of the fair dealing of the parties."

Levy v. Scott, 115 Cal. 39, 42.

> "If there be two inferences equally reasonable and equally susceptible of being drawn from the proven facts, the one favoring fair dealing and the other corrupt practice, it is the express duty of court or jury to draw the inference favorable to fair dealing. For fraud must always be proved, so that when the plaintiff's case goes no further than to establish a state of facts from which the inference of fraud may or may not be reasonably drawn, he has failed to establish his charge by a preponderance of the evidence, and it becomes the duty of Court or jury, as has been said, to find in favor of innocence and uprightness."

Original M. & M. Co. v. San Joaquin, etc. Corp., 220 Cal. 152, 165.

The principles stated in these authorities, which could be greatly multiplied, have been entirely ignored by this Honorable Court and exactly opposite principles have been applied. The Court presumes conspiracy; it infers fraud and wrongdoing from facts which comport better with fair dealing, and it does these things, not to favor some equitable right, but to enforce a forfeiture which is also abhorrent to equity. In failing to apply these principles in favor of appellant, the majority opinion of this Court has fallen into most serious error.

B. The Honorable Court is in error in holding that any fraud or false swearing can be inferred from the facts stated in its opinion.

As stated by the majority opinion "mere over-valuation does not avoid a claim". Consequently even if over-valuation existed, nothing more appearing, no inference or presumption of fraud arises. Therefore, if it be taken as established that over-valuation existed, this raises no inference of fraud.

The next statement appearing in the majority opinion is that appellant was presumably familiar with his own business.

That appellant was not in personal charge of his factory, and had not been in charge thereof for a long time prior to the fire, is a fact which the testimony shows without any contradicting fact or circumstance. Appellant maintained offices elsewhere, and if he had been in personal charge of his factory, or had visited it frequently, this would have been easy for defendants to establish. Hence any presumption of personal

familiarity with his factory and knowledge of conditions there at the time of the fire is entirely eliminated and cannot be the basis for any inference of fraud.

The next fact stated is that appellant was familiar with the system of maintaining records and that it is reasonable to assume that he knew what the general ledger and so-called perpetual inventory showed as to the amount of goods in his factory at the date of the fire. If we assume all this to be true, nevertheless no inference of fraud or false swearing arises therefrom. Of course, appellant was familiar with the forms used in his business, and it is possible he was told what the general ledger and stock sheets or so-called perpetual inventory showed was on hand at the time. However, the Court should note that Mr. Terkelson, a witness called by appellees, testified that after the fire he kept inquiring what the values were, and no one knew, and that on October 21st following the fire, he was told the values might run around $130,000.00. (V. VI, p. 2970.) Mr. Smith, adjuster for defendants, testified that he had no confidence in perpetual inventories, and from his experience they were unreliable. (V. V, pp. 2785-6.) Mr. Taylor, appellant's bookkeeper testified that a physical count of merchandise always showed more material on hand than the stock sheets showed, running into very large figures. (V. III, p. 1365.) Some material was burned up as was claimed by appellant. When appellant's bookkeeper states that his accounts always showed less than the true amount of merchandise on hand, and defendants' adjuster stated he had no confidence in such records, was not appellant justified in attempting to arrive at more accurate figures by

calling in certified public accountants; and after he had called in such accountants and they had arrived at an estimate of his loss, was he not justified in presenting their estimate as a basis of his claim without being subjected to a charge of false swearing? That this Court, or any other Court may find, after hearing all the evidence, that there was not actually as much material on hand as that estimate showed, does not give the slightest basis for any inference that the claim was not presented in good faith.

The Court next argues that it is very strange that appellant should content himself with the projected apparent inventory without research or investigation on his own part. Appellant's response was that he was not an accountant any more than the attorney questioning him was his own stenographer. He didn't keep the books of his business any more than the judges keep the records of their court, and when he called upon experts to inform him what should have been on hand, he relied upon their reports. Bank directors and officials of large corporations are constantly called upon to verify reports of which it is impossible to have personal knowledge and for the accuracy of which they must depend upon accountants.

What would an independent investigation have shown appellant? No matter what he did it would ultimately have come back to a question of accounting, and with appellant's own accountant stating that his records always showed less than what was on hand, he had to adopt some plan.

The Honorable Court criticizes appellant for taking the Hood & Strong projected apparent inventory based

upon the annual inventory of December 31, 1928, instead of claiming on the Ernst & Ernst inventory of May 31, 1929. Does the Court overlook the fact that a complete calculation was later made upon the basis of the Ernst & Ernst inventory in the hope of getting more accurate figures, and that this resulted in an increase of several thousand dollars in plaintiff's claim as set forth in his amended complaint? Apparently after considering the claim in appellant's proof of loss too large, the Court criticizes appellant for not adopting a basis which would have made it much larger.

It seems appropriate at this point to point out that in the course of the trial, in an effort to ascertain what was fairly due him, appellant requested the Court to appoint independent accountants to go over his books. Defendants strenuously resisted. The trial judge first decided to make such appointment, and then changed his mind, and the appointment was never made. (V. III, pp. 1296-7; V. III, pp. 1590-91.)

The Court refers to the statement of appellant that he handled all the large purchases, made notations from reports which he knew to be correct from personal investigation, and then the Court quotes a statement "I was familiar with the value on October 19, 1929, and I am today". The word "value" in this statement is used in the sense of "price" and not in the sense of total valuation. Any other implication of the word except "price" leads to a misunderstanding and misinterpretation of the particular testimony. (V. I, p. 526.)

Considering each of these statements in their correct meaning, there is nothing therein from which any inference is possible that the appellant's claim was fraudulently exaggerated.

The Court next quotes a statement from the testimony of R. V. Smith about grades and prices wherein he said he told Hyland "If you set up incorrect grades, or incorrect quantities, or incorrect prices and swear that those are the correct prices, you will vitiate your policy contract, and by the terms of the contract you might lose all your insurance."

Suppose such conversation took place, does it lead to any inference of fraud or false swearing? Does it indicate that appellant did not honestly believe he had what was set forth in his proof of loss? There is no basis for any inference against appellant from this testimony.

Moreover, as we fully pointed out in appellant's reply brief, pages 81 to 83, the only overgrading or overpricing claimed was in the Radford Inventory of Merchandise remaining after the fire, and we have there demonstrated mathematically beyond the possibility of controversy, that any overpricing and overgrading was beneficial to defendants and would actually decrease appellant's loss.

There is an entire *non sequitur* in the majority opinion in the statement that because there is evidence that Hyland was well acquainted with pricing and grading the salvaged merchandise and personally participated in making up and presenting the proofs of

loss, this is very persuasive against the theory that on his out of sight loss he would innocently and without investigation take the overstated report of his accountant as correct.

If Hyland knew every price and grade and personally prepared the proof of loss, still his out of sight loss was a problem in accounting and for which he had to rely upon competent accountants. The very term itself—out of sight loss—indicates that it is a loss which is incapable of inspection, study, actual investigation, or accurate measurement, and can only be estimated by accounting methods. It was obvious to appellant that there was an out of sight loss, the trial Court so found, and this Court confirms it. Was there any other way of arriving at the amount of this loss besides having accountants attempt to establish what should have been there at the time of the fire, deduct what was actually left, and claim the difference as out of sight loss? This was exactly what Hyland did, and this Court and no one else has yet suggested a better method. Hence we say that there is neither law nor logic in any inference against appellant from any evidence of his participation in preparing the proof of loss or his knowledge of grading or pricing the salvaged merchandise.

Finally the Honorable Court states that Hyland's credibility is seriously weakened by the disclosure with reference to the fictitious Newhall contracts and by his statement that he had no knowledge or belief as to the origin of the fire. We have repeatedly pointed out

that any finding of fictitious Newhall contracts is against the great weight of the evidence, and that such claimed contracts were not the basis of or part of or material to any claim of loss in this case, and it does not appear that they were material to any claim of loss or part of any claim of loss in any other case.

As to the statement that appellant stated to the insurance companies in his proof of loss that he had no knowledge or belief as to the origin of the fire, we point out that this Honorable Court in its majority opinion is in error in assuming such statement was made. Appellant's statement to the companies was:

> "A fire occurred * * * which originated from cause unknown to this assured." (V. I, p. 418.)

Under the law of California appellant was not required to state his opinion or belief as to the origin of the fire (Civil Code Sec. 2570 at that time) and appellant made no statement in his proof of loss that he had no opinion or belief. That evidence and opinions may have been presented to appellant as to the origin of the fire was not knowledge on his part, and hence his statement was exactly true.

Accordingly we respectfully submit that the majority opinion is in error in its assumption that appellant stated in his proof of loss that he had no knowledge or belief as to the origin of the fire.

The statement appellant actually made was exactly true, and consequently this Court is entirely in error in holding that appellant's credibility was in any wise affected thereby.

In the foregoing we have discussed every matter stated by this Court as supporting the inference that the trial Court was justified in finding there was false swearing in the proof of loss. We ask this Honorable Court to reconsider these matters in the light of the situation in which appellant found himself following the fire.

Would not any member of this Court have employed expert accountants and obtained the best information possible from his books and filed his proof of loss on this report? There is no suggestion anywhere in the record from any accountant otherwise than that appellant sought the most accurate information possible.

FIFTH GROUND FOR REHEARING.

THE COURT ERRED IN FAILING TO CONSIDER THE POINT THAT ANY DEFENSE OF FALSE SWEARING IN PROOF OF LOSS WAS WAIVED BY APPELLEES.

The proofs of loss in this case were presented on December 24, and 26, 1929. (V. I, p. 395.) Thereafter, for many months the defendants dealt with plaintiff without even hinting at a claim of false swearing. In the meantime thousands of dollars expense was incurred by appellant in moving, storing and handling and finally auctioning at defendants' suggestion the salvaged merchandise; loss was also sustained by decline in prices during this period. Some of this expense and loss could have been saved if false swearing had been asserted and liability denied for the loss. Moreover, the representative of the insurance com-

panies reached the scene of fire before plaintiff. (V. IV, pp. 1926-7.) From that time on, the defendant insurance companies through their representatives the fire patrol and their adjusters were constantly on the job. (V. V, p. 2617.) The adjuster told Mr. Hyland what he should do and that an estimate of the loss was required. "I told him it was not necessary for that to be accurate". (Testimony of R. V. Smith, V. V, p. 2627.)

The adjuster Smith testified that the Hood & Strong report was furnished him prior to the proof of loss about the middle of December, 1929; that he didn't attach any great importance to it. "I simply noticed the method used in arriving at what appeared to be an inventory. It was no help or benefit to me." (V. V, p. 2752.)

This was the report on which the proof of loss was based.

The defendant companies and their adjusters in disagreeing with the proof of loss claimed there was nothing burned out of sight. Yet there is not one suggestion in the evidence that subsequent to the filing of the proofs of loss and prior to filing the answers, any one ever hinted at or claimed that there was any false swearing in the proofs of loss or a forfeiture by reason of the claim of out of sight loss, or for any other reason.

Under all the circumstances of this case, considering the damaging delay to plaintiff during which there was no claim of non-liability or forfeiture by reason of false swearing, it should have been held in the

trial Court that any claim of false swearing was waived. In failing to consider this point presented both in appellant's brief, pages 34-37, and in appellant's reply brief, page 100, this Honorable Court has committed error.

The recent case of *Young v. California Insurance Co.*, 46 Pac. (2d) 718, 722 (Idaho 1936), holds that any defense of false swearing was waived where no objection on this ground was made prior to answer. The language of the Court was as follows:

> "Appellant's nowhere, if we correctly read the correspondence, based their non-liability, and so notified respondent, upon false and fraudulent statements made in the proofs of loss, but upon other grounds, and first urged their nonliability, predicated upon fraud and false swearing in the proofs of loss, in their answer in this action. In such circumstances appellants are not permitted to avail themselves of the defense of fraud or false swearing, the rule being that only specified defects can be relied upon as a defense and others not specified are waived.
>
> 'An insurer, by specifying a certain or particular defect or defects in proofs of loss, waives all other defects therein. And since a requirement that notice of loss be given is for the purpose of enabling the insurer promptly to investigate, such notice is waived where the insurer sends its local agent and adjuster to examine the property, and later objects to the proofs of loss as furnished, but does not mention the fact that the notice was oral, and not written as required by the policy * * * The rule that only specified defects can be relied on as a defense, and others

not specified are waived, also applies where insurer notifies insured that it refuses settlement for noncompliance with the contract time for filing proofs, and other reasons. * * *' 7 Couch, Cyclopedia of Insurance Law, Sec. 1593, p. 5593.

'If an insurer requires or receives proofs of loss, and subsequently requires the claimant to furnish additional proofs, or to amend the proofs already filed, or to perform some similar act, and at the time has knowledge of breaches of any of the conditions of the policy, or of any other cause, such as misrepresentation, etc., which might be a defense to an action on the policy, and remains silent as to such defense, a waiver is effected, and the insurer is estopped from setting up such breach of condition, or other cause preventing recovery. Thus, the act of a grand recorder of a lodge, after, and with knowledge of, a forfeiture arising from the insured having engaged in a prohibited occupation, in requesting further special proofs of loss, effects a waiver of the forfeiture. So, if an insurer recognizes the continued existence of a contract by requiring proofs of claim, which are furnished at some trouble and expense, it waives any right to take advantage of any previously known grounds for forfeiture. And a requirement of immediate notice of loss is waived by requesting additional proofs, the furnishing of which involves considerable trouble and expense. In order to constitute a waiver in such cases, however, it must appear that the company had knowledge of such defenses at the time of requiring the additional proof. And the parties may validly contract that a demand for proofs or for additional proofs, shall not effect a waiver,

and when it is so provided, calling for additional proofs does not waive a defense of delay or misrepresentations.' 7 Couch Cyclopedia of Insurance Law, Sec. 1596, p. 5597."

Young v. Calif. Ins. Co., 46 Pac. (2d) 718, 722 (Ida.).

"Whether in this case there was false swearing upon the part of plaintiff was conclusively sealed by the verdict of the jury, though, commingled with that consideration was the other, that the jurors were told to disregard any matters pertaining to false swearing in the proofs of loss, if they believed defendant was in full possession of all the facts and circumstances relating to the fire at the time plaintiff received the Dimich letter.

On this point Mr. Chief Justice Moore, in Wyatt v. Henderson, 31 Or. 48, 48 Pac. 790, credits Mr. Justice Swayne in Railway Co. v. McCarthy, 96 U. S. 258, 24 L. Ed. 693, as saying: 'Where a party gives a reason for his conduct and decision touching anything in action in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law'.

We see no reason to depart from this rule which is securely rooted in common justice and plainly applicable to the case at bar. After the lapse of some months subsequent to the fire, defendant expressed its declination to meet the terms of the contract of insurance upon the sole ground that certain acts of the plaintiff had in-

creased the hazard of its risk. Accepting this position of defendant's as the battle ground, plaintiff employed counsel and initiated this action. By this conduct, defendant led plaintiff to believe that there was but one reason for its denial of liability; consequently under such circumstances, defendant should not be permitted to screen itself from liability on grounds other than the one specified in the letter indited by its legal representative, provided defendant had informed itself prior to the letter of the cause of the fire, and was in possession of the material which it now claims exculpates it from liability. 'Every consideration of public policy demands that insurance companies should be required to deal with their customers with entire frankness. They may refuse to pay without specifying any ground, and insist upon any available ground, but, when they plant themselves upon a separate defense and so notify the insured, they should not be permitted to retract if the latter has acted upon their position as announced, and incurred expense in consequence of it,' said Mr. Chief Justice Church speaking for the Court of Appeals in Brink et al. v. Insurance Co., 80 N. Y. 108, and quoted with approval in McCormick v. Ins. Co., 163 Pa. 193, 29 Atl. 747."

Ward v. Queen City Fire Ins. Co., 138 Pac. 1067, 1068 (Ore.).

"If the Company, after knowledge of the breach, enters into negotiations or transactions with the assured, which recognizes and treats the policy as still in force, or induces the assured to incur trouble or expense, it will be regarded as

having waived the right to claim a forfeiture. To the same effect is Ins. Co. v. Norton, 96 U. S. 234, 24 L. Ed. 689."

Georgia Home Ins. Co. v. Allen, 30 S. 537, 539.

In the U. S. Supreme Court case referred to, that Court in upholding the waiver of a forfeiture stated:

"Forfeitures are not favored in the law. They are often the means of great oppression and injustice, and where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture, upon such compensation being made."

Ins. Co. v. Norton, 96 U. S. 234, 242, 24 L. Ed. 689, 692.

Slight evidence of a waiver of a forfeiture is sufficient.

"Since the law favors the waiver of forfeiture, the amount of evidence necessary to establish such a waiver is less than that needed to establish a forfeiture. Waiver may be shown by *parol,* and by circumstances or a course of acts or conduct, proof of express language being unnecessary."

25 *Cal. Juris.* p. 932.

"It follows from the fact that forfeitures are abhorred that a waiver of forfeiture is favored and requires less evidence to establish than is required to establish a forfeiture. Indeed, it has been held that slight evidence of waiver is sufficient."

12 *Cal. Juris.* p. 642.

Considering the many months of negotiations, the sale of the salvaged merchandise consented to by de-

fendants, the expenses heaped upon plaintiff, and the failure to assert any false swearing prior to the filing of the answer, it should be held in this case that any cause of forfeiture, if any existed, by reason of false swearing in the proof of loss, was waived.

This Honorable Court in its majority opinion has erred by failing to consider this point.

SIXTH GROUND FOR REHEARING.

THE MAJORITY OPINION IS IN ERROR IN HOLDING THAT FRAUD OR FALSE SWEARING COULD BE BASED UPON CLAIM OF OUT OF SIGHT LOSS SET FORTH IN THE PROOF OF LOSS.

The claim of out of sight loss set forth in the proof of loss, and as appeared therein was an accountant's estimate. This estimate was the Hood & Strong report of November, 1929. (Pfs. Exhibit I, V. I, pp. 246-248.) This report itself shows that it was not based upon an audit. (V. I, p. 246.) It was presented to defendants' adjuster prior to the filing of the proof of loss. (V. V, p. 2751.) He stated that it was of no help or benefit to him. (V. V, p. 2752.)

The proof of loss had attached to it this Hood & Strong report and the proof of loss showed that it was based upon this report, the proof stating:

> "Merchandise value on hand 10/19/29 as per Hood & Strong report attached, $102,453.23." (V. I, p. 423.)

The Hood & Strong report showed exactly how the figures were arrived at. (V. I, pp. 246-8.)

This Honorable Court has entirely overlooked the fact that a proof of loss of this character is not calculated to deceive, could not deceive, did not tend in any wise to mislead defendants, and purported only to represent information furnished to appellant. Appellant in effect stated: "Hood & Strong have made a report to me which I hand you herewith as the basis of my claim. The method of arriving at an estimate of my loss and the calculations are fully shown".

We submit that such proof of loss which correctly represented information furnished appellant, and was made solely upon information furnished to appellant by accountants whose integrity has never been questioned, and whose fairness is conceded by accountant for defendants, cannot legally be the basis for a charge of false swearing.

> "Fraud and false swearing imply something more than some mistake of fact or honest misstatements on the part of the assured. They consist in knowingly and intentionally stating upon oath what is not true, or the statement of a fact as true, which the party does not know to be true, and which he has no reasonable ground for believing to be true."
>
> *Atherton v. British Am. Assur. Co.*, 30 A. 1006 (Me.).
>
> "Was there false swearing in the proof of loss as to the amount of goods on hand at the time of the fire?
>
> This question must be answered in the negative.
>
> The rule of law on this subject is well settled, and is to the effect that such false swearing, to

forfeit an insurance policy, must consist in an oath to statements knowingly and willfully false, or recklessly made."

Va. Fire & Marine Ins. Co. v. Hogue, 54 S. E. 8;

North British Ins. Co. v. Nidiffer, 72 S. E. 103, Ann. Case 1916A 464.

"The proof of loss was based on statements made out by Weiss, the expert accountant first employed by the assured. There were mistakes therein, but, as shown by the evidence, as above indicated, they were honest mistakes, not misstatements of fact designedly made. They were honestly believed by the assured to be correct at the time the proof of loss was sent to the insurance company."

Lavenstein Bros. v. Hartford, Fire Ins. Co., 99 S. E. 579, 588 (Va.).

In the case of *Helbing v. Svea Ins. Co.,* 54 Cal. 156, 159, the Supreme Court of California stated upon a claim of false swearing:

"It is true that soon after the fire the assured submitted their claim wherein they alleged the aggregate of their losses to be over $4500.00, but the claim was accompanied by an *exhibit* from which it appeared that their estimate was based upon the amount of bills for goods purchased during the period of several months prior to the fire, less the amount of cash sales during the same period. It would not have been credible that the defendant could have been deceived by such a statement and exhibit, and it appears affirmatively that its agents were not deceived."

See, also,

Maher v. Hibernia Ins. Co., 67 N. Y. 283, 292.

With some of his property burned up, making it necessary to rely upon accountants, appellant's proof of loss was reasonably founded; it was a true representation of the accountant's reports to appellant; it could not deceive and could not constitute false swearing, and consequently the majority opinion is in error in sustaining a finding of false swearing thereon.

SEVENTH GROUND FOR REHEARING.

THE COURT HAS ERRED IN SUSTAINING THE JUDGMENT OF THE TRIAL COURT UPON CLAIM OF FALSE SWEARING WHICH WAS NOT PLEADED.

So far as the proofs of loss were concerned, the defendants pleaded false swearing (except as to origin of the fire) *only* as follows:

> "Plaintiff claimed that the loss sustained by reason of the fire * * * was and is the sum of $73,601.96 * * * whereas in truth and in fact the loss sustained by said plaintiff by reason of said fire did not exceed the sum of * * * $35,000.00, which fact plaintiff well knew at the time of preparing and verifying said purported proofs of loss."
>
> (V. I, pp. 43-44.)

This Honorable Court has not found, nor did the trial Court find that appellant knew his loss did not exceed $35,000.00. It would be impossible to reasonably make such finding in view of defendants' offer

of adjustment in the sum of $55,000.00 made by defendants and refused by appellant, and which appellant offered to prove in the trial Court. (V. VI, p. 2975.)

It is thus apparent from their pleadings that defendants did not claim that the item of $15,645.25 in appellant's proof of loss, according to the calculation based upon the Hood & Strong report was false or fraudulent, otherwise they would have specified this item. And since defendants did not charge fraud or false swearing in their answers by reason of this claim of out of sight loss, it was error for the trial Court or for this Honorable Court to find fraud or false swearing based upon this claim.

No rule of pleading is better known than that a charge of fraud must be specifically made.

> "One against whom charges of fraud are made is entitled to specific averments of the acts of which he is accused."
>
> 12 *Cal. Jur.* 800-801.

> "It is not, therefore, sufficient to allege fraud in general terms."
>
> 12 *Cal. Jur.* 802.

> "It is a cardinal rule of pleading that fraud must be pleaded in specific language descriptive of the acts which are relied upon to constitute fraud. It is not sufficient to allege it in general terms, or in terms which amount to mere conclusions."
>
> *Hannon v. Madden,* 214 Cal. 251, 267;
>
> *Vanderwort v. Farmers etc. Nat. Bank,* 7 Cal. (2d) 28, 30.

The fraud or false swearing relied upon must be pleaded even though the defendant first becomes aware of the facts at the trial. It was so held in *Solem v. Connecticut Fire Ins. Co.,* 109 Pac. 432, 434 (Mont.), where the Court holding that the trial Court properly refused an instruction on false swearing which was not pleaded, though evidence thereof appeared at the trial, stated the following:

> "* * * The well-nigh universal rule is that to avail itself of such a defense, the defendant must have specially pleaded it. 11 Ency. of Pl. & Prac. 422, Geiss v. State Inv. & Ins. Co., 98 Cal. 241. And the reason for the rule is apparent. The provision of the policy quoted above (fraud and false swearing) is for the exclusive benefit of the insurance company and may be waived by it. 8 Current Law 430 and the cases cited. Being for the specific benefit of the company, it will be deemed to have been waived unless pleaded."

> "Fraud or false swearing is an affirmative defense which must be specially pleaded."
> 26 *C. J.* 499.

We respectfully point out therefore, that defendants did not plead any fraud or false swearing by reason of the claim of out of sight loss in the proof of loss, and by their failure to plead any fraud or false swearing in respect to this matter, it must be deemed by this Court that they elected not to rely upon such defense, and waived it. Hence it was and is error for this Honorable Court to sustain the judgment against appellant upon a defense which defendants chose not to plead.

EIGHTH GROUND FOR REHEARING.

THE COURT ERRED IN FAILING TO CONSIDER THE POINT MADE BY APPELLANT THAT THE MEMORANDUM OPINION OF THE TRIAL COURT DID NOT COMPLY WITH EQUITY RULE NO. 70½.

The first error set forth by appellant on this appeal was the error of the trial Court in failing to comply with Equity Rule 70½ which requires the Court of first instance to "find the facts specially and state separately its conclusions of law therein". This rule has the force and effect of law.

The error of the trial Court in failing to follow this rule is discussed in appellant's brief, pages 8-18. It is there shown that the opinion of the trial Court adopted as its findings of fact and conclusions of law wholly fails to comply even in substance with the rule. The opinion is argumentative, discursive and indefinite, it finds facts not in issue, and failed to find on the principal issue in the case.

We believe that the failure of the trial Court to make proper findings, but instead to set forth an argumentative opinion, has led this Honorable Court into error to the great injury of appellant.

Certainly this Honorable Court in its opinion in the decision of this case has entirely failed to consider the error of the trial Court in failing to comply with Equity Rule 70½.

We refrain from repeating the argument heretofore made on this point and ask the Court to refer to appellant's brief, pages 8-18, for the discussion of this error by the trial Court and the law applicable. We

further ask this Court to now consider the error and because of the prejudice that has resulted to appellant by reason of the disregard of this rule, to grant a rehearing and reverse the judgment herein.

NINTH GROUND FOR REHEARING.

THE MAJORITY OPINION IS IN ERROR IN FAILING TO CONSIDER ALL THE EVIDENCE IN THE CASE, BUT HAS CONSIDERED ONLY THE EVIDENCE FAVORABLE TO APPELLEES.

The able dissenting opinion expresses in strong and concise language the error into which the majority has fallen, which is to seek out evidence in the record to sustain the judgment of the Court below, instead of considering the whole record and trying the case *de novo*. Because we are unable to express this matter as well as it is expressed in the dissenting opinion herein, we quote the following from it:

> "The majority has pointed out certain evidence in favor of appellees, and without relating any of the evidence in favor of appellant, or making any statement indicating that it considered it, concludes: 'This constitutes sufficient evidence to support the finding'. It is quite apparent that the majority has treated the case as an action at law, in which our duty is to ascertain whether or not there is any substantial evidence to support the findings. However, this is a suit in equity. As said in Aro Equipment Corporation v. Herring-Wisler Co. (CCA 8), 84 F. (2d) 619, 621:
>
> '* * * An appeal in equity brings before the appellate court the whole record, and the court

> is required to examine the record and try the case de novo. The findings of the trial court, while entitled to great weight, may be adopted or discarded by the appellate court, even though supported by substantial evidence.'

This is the rule which has formerly prevailed in this court (Presidio Mining Co. v. Overton (CCA 9), 270 Fed. 388, 389 et seq.; Title Guarantee & Trust Co. v. United States (CCA 9), 50 F. (2d) 544, 546), and it has been universally followed in other circuits. A few of the cases are: New York Life Ins. Co. v. Simons (CCA 1), 60 F. (2d) 30, 32 (cert. den. 287 U. S. 648); Victor Talking Machine Co. v. George (CCA 3); 69 F. (2d) 871, 877 (reversed on other grounds, 293 U. S. 377); Holmes v. Cummings (CCA 5), 71 F. (2d) 364, 365; Laursen v. Lowe (CCA 6), 46 F. (2d) 303, 304; Undergraff v. United Fuel Gas Co. (CCA 6), 67 F. (2d) 431; Equitable Life Assur. Soc. v. Vaughn (CCA 6), 82 F. (2d) 978, 979; Johnson v. Umsted (CCA 8), 64 F. (2d) 316, 318; Elliott v. Gordon (CCA 10), 70 F. (2d) 9.

In accordance with these cases we are required to weigh the evidence, along with the presumption of correctness attending the chancellor's findings. If, however, the chancellor has made a serious mistake of fact or law, the presumption disappears. Such mistake may be the consideration of evidence wrongfully admitted, an application of erroneous law in finding the fact, or in erroneously weighing the evidence as shown in New York Life Ins. Co. v. Simons (CCA 1), supra, 32. It was there said:

> 'For an appellate court to hold that a finding of fact by a sitting justice in an equity case is

clearly wrong it is not necessary that there shall be no substantial evidence to support it; but, if it clearly appears to the appellate court that the great weight of the evidence is clearly contrary to the factual finding of the sitting justice, or the inference of the sitting justice from proven facts is unreasonable, then his finding may be disregarded, and the appellate court determine the facts from the evidence before it, or may draw different conclusions from the facts found."

I believe sufficient has been said to show that the majority has acted on an unsound basis in its decision of the case."

CONCLUSION.

Because the majority opinion herein perpetuates an injustice which damages appellant financially and ruins his character; because the majority opinion has failed to consider substantial matters of fact and established rules of law in appellant's favor; because the majority opinion has failed to apply well founded rules of pleading and fundamental principles of equity in appellant's favor; because the majority opinion has not observed and followed the rules in equity as established by the Supreme Court of the United States, and has not followed the accepted equity practice throughout the United States in considering this case, a rehearing should be granted by this Court.

Therefore, being confident of the willingness and desire of this Court to do justice, appellant respectfully

prays for a rehearing upon all the grounds hereinbefore stated.

Dated, San Francisco,
September 8, 1937.

Respectfully submitted,
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CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
September 8, 1937.

MORGAN V. SPICER,
Of Counsel for Appellant and Petitioner.